

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANDREW C. BICKEL,)	
Plaintiff,)	
v.)	C.A. No. 09-115 ERIE
JAMES VECHECCO, et al,)	
Defendants.)	

MEMORANDUM ORDER

Plaintiff's complaint was received by the Clerk of Court on May 19, 2009, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation ("R&R"), filed on February 22, 2010, recommended that the motion to dismiss, or alternatively, for summary judgment, filed by Defendant Graml [Document # 14] be granted. It was further recommended that the "motion to dismiss" filed by Defendant Vechecco [Document # 20] be granted (R&R at 9), and recommended that the claims against John and Jane Doe be dismissed.

The parties were allowed fourteen (14) days from the date of service to file objections. Objections were filed by the Plaintiff on March 10, 2010. After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, we adopt Magistrate Judge Baxter's February 22, 2010 R&R in part as our opinion, reject it in part, and we will recommit the matter to Magistrate Judge Baxter for further consideration.

Specifically, we adopt Magistrate Judge Baxter's R&R as our opinion with respect to Plaintiff's claims as to defendants John and Jane doe, on the grounds that they have not been served in violation of Fed. R. Civ. P. 4(m).

However, the R&R refers to the pending dispositive motion filed by Defendant Vechecco as a motion to dismiss, when in fact, it is a motion for summary judgment. The R&R states, "[d]espite all of the allegations of Plaintiff's lengthy complaint and briefs in opposition to the pending dispositive motions, Plaintiff has not affirmatively *alleged any facts* supporting the personal involvement of either named Defendant in any of his claims . . ." (R&R at 7.) The R&R cites the appropriate rule and standards for the pending motions (motions for summary judgment under Fed. R. Civ. P. 56 (c) and motions to dismiss under Fed. R. Civ. P. 12(b)(6). But it is unclear whether she was recommending a *sua sponte* dismissal (a standard which is not cited) of the claims against Defendant Vechecco for failure to adequately plead under *Twombly*, and *Iqbal*, or whether she was under the impression that Vechecco had filed a motion to dismiss ("[a]ccordingly, *both motions to dismiss*

should be granted . . .”) (R&R at 8) (emphasis added). Moreover, we note that the R&R does not address whether amendment of the complaint would be futile.

Out of an abundance of caution, because the arguments put forth by the parties are similar, we will also recommit the matter with respect to the claims brought against defendant Graml, and will address those claims upon receipt of an overall amended report and recommendation.

AND NOW, this 30th day of March, 2010;

IT IS HEREBY ORDERED, ADJUDGED and DECREED that said report and recommendation is adopted as the opinion of the Court with respect to its conclusion that Plaintiff’s claims against John and Jane Doe are DISMISSED. The Clerk of Courts is directed to terminate defendants John and Jane Doe.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that said report and recommendation is rejected and recommitted to Magistrate Judge Baxter for further consideration of the motion to dismiss, or alternatively, for summary judgment, filed by Defendant Graml [Document # 14] and the motion for summary judgment filed by Defendant Vechecco [Document # 20].

Maurice B. Cohill, Jr.
MAURICE B. COHILL, JR.
United States District Judge

cc: Susan Paradise Baxter
U.S. Magistrate Judge
all parties of record _____